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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 203

ANTHONY CARDARELLA and FELIX FERINA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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INDEX

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Constitutional Provisions and Statutes Involved 5
Statement 5
Reasons for Granting the Writ 9

1. There Is No Evidence That Appellants, or Either of Them, Had Any Knowledge That There Was a Pending Prosecution in the Federal Court in Omaha Against Biase or That Sheetz Might Be a Witness Therein or That It Was Because of Said Proceedings and the Status of Sheetz That He Was Assaulted 9

2. There Was No Evidence of a Conspiracy to Obstruct Justice by Assaulting Sheetz or That Appellants, or Either of Them Were Members of Any Such Conspiracy 13

3. The Conviction of Appellants Without Evidence of the Essential Elements of the Offense Charged Denies Them Due Process of Law As Guaranteed under the Fifth Amendment to the Constitution of the United States 19

4. The Trial Court Committed Prejudicial and Reversible Error in Overruling Objections of Appellants' Counsel to the Final Argument of the Special Assistant to the Attorney General of the United States in Charge of the Prosecution That He Believed Government Witness Sheetz and Vouched for Him 21

5. The Trial Court Abused Its Discretion in Overruling Appellants' Motions for New Trial Because of Newly Discovered Evidence (Cases Numbered 16909 and 16911 in the Court of Appeals) 27

Conclusion 35
Certificate of Counsel 36

Appendix—

Statutes and Regulations Involved A1
Criminal Rule 33. New Trial A2
Indictment A3
Judgments and Commitments A9
Motion of Felix Ferina for a New Trial A11
Summary of New Evidence and Its Importance A11
Exhibit 1, Discharge of John Cardarella in Case No. C-30069 ..... A31
Exhibit 2, Investigation Report of Police Officer Robert Sanders A33
Exhibit 3, Kansas City, Missouri, Police Department Complaint Report A34
Suggestions in Support of Motion of Felix Ferina for a New Trial A36
Opinion A37
Judgments, United States Court of Appeals for the Eighth Circuit A77
Joint Motion for Rehearing A79
Order Overruling Motion for Rehearing A89
Order A90

TABLE OF CASES

Bailey v. *Branin*, 3 Cir., 279 F.2d 344 35
Berger v. *United States*, 295 U.S. 78, 55 S. Ct. 629 ..... 23, 26
Bowles v. *Willingham*, 321 U.S. 503, 64 S. Ct. 641 20
Canella v. *United States*, 9 Cir., 157 F.2d 470 14
Crowell v. *Benson*, 285 U.S. 22, 52 S. Ct. 285 10
Curry v. *McCanless*, 307 U.S. 357, 59 S. Ct. 900 21
Delbridge v. *United States*, U.S. Ct. App., Dist. of Col., 262 F.2d 710 34
Direct Sales Co. v. *United States*, 319 U.S. 703, 63 S. Ct. 1265 14

Fort Street Union Depot Co. v. Hillen, 6 Cir., 119 F.2d 307 35
Garner v. State of Louisiana, 82 S. Ct. 248 19
Gaynor v. Atlantic Greyhound Corporation, 3 Cir., 183 F.2d 482 35
Ginsberg v. United States, 5 Cir., 257 F.2d 950 26
Greenberg v. United States, 1 Cir., 280 F.2d 472 ..... 24, 26
Griffin v. United States, 183 F.2d 990 ..... 33, 34
Griffin v. United States, 336 U.S. 704, 69 S. Ct. 814 ..... 30, 32
Guthrie v. United States, U.S. Ct. App., D.C., 207 F.2d 19 35
Hargett v. United States, 5 Cir., 183 F.2d 859 9
Heiner v. Donnan, 285 U.S. 312, 52 S. Ct. 358 20
Henderson v. United States, 4 Cir., 24 F.2d 811 9
Ingram v. United States, 360 U.S. 672, 79 S. Ct. 1314 ..... 15, 16
Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239 14
Lampe v. United States, U.S. Ct. App., D.C., 229 F.2d 43 34-35
McQueen v. United States, U.S. Ct. App., D.C., 262 F.2d 455 35
Mejia v. United States, 9 Cir., 291 F.2d 199 34
Odom v. United States, 5 Cir., 116 F.2d 996 10
Oyama v. State of California, 332 U.S. 633, 68 S. Ct. 269 9
Parr v. United States, 363 U.S. 370, 80 S. Ct. 1171 18
Pettibone v. United States, 148 U.S. 197, 13 S. Ct. 552, 37 L. Ed. 419 ..... 9, 15
Snipes v. United States, 6 Cir., 230 F.2d 165 26
Southern Extract Co. v. Green, 6 Cir., 103 F.2d 232 35
Steele v. United States, 5 Cir., 222 F.2d 628 26
Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624 19
Travelers Ins. Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437 35
United States v. Bufalino, 2 Cir., 285 F.2d 408 17
United States v. Solow, U.S. D.C., S.D. N.Y., 138 F. Supp. 812 10

United States v. *Spangelet*, 2 Cir., 258 F.2d 338 26
Wallace v. *United States*, 4 Cir., 281 F.2d 656 26

TEXTS AND STATUTES

39 Am. Jur. 178, New Trial, Sec. 173 35
66 C.J.S. 322, New Trial, Sec. 113, b 35
Rule 33, Federal Rules of Criminal Procedure 5, A2
Section 371, Title 18, U.S.C. 5, A1
Section 1254 (1), Title 28, U.S.C. 2
Section 1503, Title 18, U.S.C. 5, 9, A1
United States Constitution, Fifth Amendment 5, 19, 20, A1

SUPREME COURT OF THE UNITED STATES

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No. ____

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Anthony Cardarella and Felix Ferina respectfully pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit in the consolidated cases of Anthony Cardarella, Appellant, v. United States of America, Appellee, numbers 16,786 and 16,911 and Felix Ferina, Appellant, v. United States of America, numbers 16,783 and 16,908, entered on April 17, 1962.

OPINIONS BELOW.

No opinion was filed by the trial court. The judgments in the trial court are set out in the Appendix, pages A7 to A10. The opinion of the Court of Appeals is not yet reported but is set out at pages A37 to A75, inclusive, of the Appendix attached hereto.

JURISDICTION.

The jurisdiction of this Court to entertain the instant petition for Certiorari is based upon Section 1254 (1), Title 28, United States Code.

The judgments of the Court of Appeals sought to be reviewed were entered on April 17, 1962 (true copies of said judgments of the Court of Appeals are set out at pages A76 to A79, of the Appendix hereinafter). Petitioners' timely Petition for Rehearing was overruled by the Court of Appeals on May 14, 1962. A copy of said petition for rehearing is set out at pages A79 to A89 of the Appendix. On May 23, 1962, the Court of Appeals entered an order extending the stay of the mandate in the cases of Anthony Cardarella v. United States, numbered 16,786 and 16,911 for a period of thirty days from said date.

QUESTIONS PRESENTED.

Petitioners herein respectfully submit that the United States Court of Appeals for the Eighth Circuit in its opinion and judgments herein has decided Federal constitutional questions in a way in conflict with applicable decisions of this court; has rendered decisions in conflict with the

decisions of other United States Courts of Appeals on this same matter, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the court's power of supervision. The questions presented are:

1. Whether submissible cases for the jury were made under the substantive counts of the indictment (Counts I and II) upon the charges of interference with a Federal Government witnes. to prevent him from testifying when there was no evidence appellants, or either of them, had any knowledge or information there was in existence such a person as Anthony J. Biase, or that he was being prosecuted in the Federal Court in Omaha, Nebraska, or that Sheetz might be a witness in such prosecution, or that the assault on Sheetz was for the purpose of preventing him from testifying in said proceedings?

2. Whether a submissible case for the jury was made under the conspiracy count of the indictment (Count IV) when there was no evidence of the essential elements of the substantive offense, as set forth above, and when there was the further absence of any evidence that Biase, the defendant in the pending proceedings in Omaha, had any connections with appellants or the alleged conspiracy and his conviction was reversed herein by the Court of Appeals; when there was no evidence appellants had been seen together or had communicated with each other during the pendency of said Omaha prosecution and prior to the assault or had any interest in or connection with the narcotics traffic or any motive for preventing Sheetz from testifying in said proceedings?

3. Whether the conviction of appellants without evidence that appellants, or either of them, had ever heard of Anthony Biase, had any knowledge or information he

was being prosecuted in a Federal Court in Omaha, Nebraska, or that Sheetz might be a witness in that case, or that the assault on Sheetz was for the purpose of preventing him from testifying in said proceedings, deprived appellants of due process of law in violation of their rights under the Fifth Amendment to the Constitution of the United States?

4. Whether the trial court committed prejudicial and reversible error in overruling the objections of defense counsel to the argument of the Special United States Attorney in charge of the prosecution wherein he stated that he vouched for Sheetz as a witness; that there never was a witness more impressive; that Sheetz told the story as he knew it and thereby brought the opinion herein into conflict with controlling opinions of this Court and into conflict with opinions of United States Courts of Appeals for other circuits?

5. Whether the District Court committed an abuse of discretion and brought this opinion into conflict with controlling decisions of this court in overruling appellants' motions for a new trial on the grounds of newly discovered evidence which Government Police Officer witness Robert W. Sanders studiously concealed in giving testimony in depositions and in three trials, and which the prosecution failed to divulge; the newly discovered evidence being that the prosecuting witness Sheetz, the only witness identifying appellants, almost immediately after being shot, told Officer Sanders he had been shot by two colored men, evidence of utmost importance on the vital issue of identification and directly contradictory of Sheetz' trial testimony herein, and in previous trials and depositions, wherein he identified these two white appellants as his assailants?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Fifth Amendment to United States Constitution, Section 1503, Title 18, United States Code. Section 371, Title 18, United States Code. Rule 33, Federal Rules of Criminal Procedure.

The Constitutional Provision and Statutes involved, so far as pertinent, are set out in the Appendix, *infra*, pp. A1-A2.

STATEMENT.

During 1959, Kenneth Bruce Sheetz, the government's chief witness and the only witness to connect appellant with this case in any manner, made three or four purchases of narcotics from Anthony (Tony) Biase in Omaha, Nebraska. (Tr. 101) Sheetz sold this "dope" on three occasions to a blond haired woman about 28 years of age in Kansas City, Missouri. (Tr. 157) Two of these sales were made to this young woman by Sheetz directly and one was made indirectly through a man named "Swede". (Tr. 158) Thereafter, during early September, 1959, Sheetz was arrested in Kansas City for the sale of narcotics (Tr. 101) and taken to the Jackson County jail. On about September 21, 1959, Sheetz began working with Bernard A. Theisen, Jr., a 32 year old narcotics agent employed by the Treasury Department, in efforts to keep himself out of the penitentiary. (Tr. 32, 33, 37) Sheetz continued to work with Theisen until the following March and during this period of time spent about sixty percent of his time with Theisen. (Tr. 33) Theisen does not know what Sheetz was doing during the remaining forty percent of the time.

(Tr. 25) During the above period, Sheetz and Theisen traveled in about twenty states, worked in about eight or ten of these states and Sheetz was holding himself out as a narcotic buyer and also as a narcotic seller (Tr. 26) and while working together they traveled, ate and slept together. Sheetz received no compensation for this work except per diem and travel expenses. (Tr. 35)

Sheetz took Treasury Agent Theisen to Omaha and introduced him to Anthony Biase and some others. (Tr. 36, 100) Biase made two sales of narcotics to Theisen in Omaha. (Tr. 9, 11) Theisen and Sheetz then appeared before a Grand Jury in Omaha and testified against Biase resulting in his indictment. (Tr. 17, 18, 106) After returning to Kansas City Sheetz did not discuss with anyone his appearance before the grand jury in Omaha. (Tr. 107)

While he was working with Theisen, Sheetz' bond was cancelled and he was committed back to jail from about April 1 to May 3, 1960. (Tr. 105) During his commitment Sheetz pleaded guilty to the narcotics charges but was not sentenced and at the time of this trial had not been sentenced. (Tr. 105) Sheetz testified he knew he could get a long term for sale of dope (Tr. 161) and he was doing everything he could to avoid serving time for his narcotics violations. (Tr. 161, 30)

Sheetz' long previous criminal record is summarized on page 4 of this petition.

On the morning of June 20, 1960, Sheetz was shot four times (Tr. 100, 108, 109, 115) while in the front doorway on the front porch of his home in Kansas City (Tr. 115) by one of two men who were inside the house which was fairly dark. Sheetz, although near sighted and not wearing his glasses, saw the gun and the two men all in one fifth of a second before he was shot. (Tr. 135, 136, 137)

He later got a quick glimpse of the smaller of the two men in the doorway. (Tr. 172, 173) He told Officer Sanders (the first officer to reach him) that he knew who shot him but declined to tell the officer who they were. (Tr. 206, 210) Officer Sanders testified Sheetz would not tell who shot him. (Tr. 210)

During the day he told Officer Kelly he knew who shot him but was not ready to tell who they were. (Tr. 261, 260, 139) Later that evening he stated his assailants were these appellants. (Tr. 129, 168, 169)

Some indefinite time later Sheetz for the first time stated that the man holding the gun, whom he identified as appellant Anthony Cardarella, as he fired the final shot said: "Here's something from Tony." (Tr. 114, 149) Appellants were not arrested until nearly a month after the shooting. (Tr. 263)

The identification of appellants rests entirely on the testimony of Sheetz. The men who shot Sheetz were seen in broad daylight out in the open by a letter carrier, John Marvin Nelson, Jr. (Tr. 189-196); a school teacher, Anna Mae DeWitt (Tr. 196-205); and a truck driver, Donald L. B. Erwin. (Tr. 214-222) These people were all totally disinterested and testified as witnesses for the Government. Not only did they all positively refuse to identify either appellant as one of the men seen on that occasion (Tr. 202, 221, 194) but they testified to descriptions of the men seen leaving the Sheetz home and proceeding down the street which positively disproved either appellant was one of such men. (Tr. 194, 202, 198, 217)

Although the Government found three cards of latent fingerprints on the rear door of Sheetz' home where the assailants broke in, found a crowbar, a blue glove, a leather glove, a golf cap, a white handkerchief, a cartridge case, a

prybar, a revolver and remnants of .38 caliber bullets (Exhibits 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, Tr. 208, 277, 272, 252), there was no evidence connecting any of those exhibits with these appellants.

Ferina was acquitted in the state court and the state dismissed as to Cardarella. (Opinion, Court of Appeals, Appendix p. A63)

There was no evidence that either appellant knew or ever heard of Anthony Biase of Omaha. There was no evidence either appellant knew there was a pending action in federal court in Omaha or that Sheetz might be a witness in said action. There was no evidence either appellant ever had any interest in or connection with the narcotics traffic. There was no evidence of any communication, either directly or indirectly, between appellants and Biase or anyone else in Omaha.

The record facts as to alleged newly discovered evidence are omitted here in the interest of brevity and set out under point 3 of the reasons for granting the writ. The same is true as to the facts concerning the prejudicial arguments which are set out under point 4 of reasons for granting the writ.

Further facts will also be set out hereinafter in connection with the particular points to which they are applicable.

REASONS FOR GRANTING THE WRIT.

1. There Is No Evidence That Appellants, or Either of Them, Had Any Knowledge That There Was a Pending Prosecution in the Federal Court in Omaha Against Biase or That Sheetz Might Be a Witness Therein or That It Was Because of Said Proceedings and the Status of Sheetz That He Was Assaulted.

The substantive offense charged here is interference with a Government witness in a proceeding in a Federal Court under 18 U.S.C., Sec. 1503. Indictment, Appendix pp. A3-A6.

The burden was on the Government to prove beyond a reasonable doubt that appellants, or either of them, had knowledge of the pending prosecution of Biase in Omaha and that Sheetz might be a witness in said proceedings and that it was because of such status that Sheetz was assaulted. *Pettibone* v. *United States*, 148 U.S. 197, 13 S. Ct. 542, 37 L. Ed. 419; *Hargett* v. *United States*, 5 Cir., 183 F.2d 859, 864, 865; *Henderson* v. *United States*, 4 Cir., 24 F2d 811, 812.

In the case of *Oyama* v. *State of California*, 332 U.S. 633, 636, 68 S. Ct. 269, in a Certiorari proceeding, the Court said (l.c. 270):

> "[1] In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

In the case of *Crowell* v. *Benson*, 285 U.S. 22, 60, 52 S. Ct. 285, the Court said (l.c. 296):

> "[11] In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

In the case of *Odom* v. *United States*, 5 Cir., 116 F.2d 996, 999, the Court affirmed the charge and judgment of the trial court in a prosecution under this statute wherein the trial court said (l.c. 999):

> " 'The defendant must have known or must have had reasonable grounds for believing that the case was pending in the United States District Court and that Stansbury was a witness in that case * * * and it must have been for the purpose of attempting to influence, intimidate or impede Stansbury from testifying, etc.' "

On Certiorari, the Solicitor General confessed error and this Court granted the writ and reversed and remanded the case to the District Court for further proceedings. *Odom* v. *United States*, 313 U.S. 544, 61 S. Ct. 957.

In his memorandum confessing error the Solicitor General acknowledged that the obstruction of justice statute "recognizes as an essential element of liability actual knowledge or belief that the person assaulted was or is a witness in a federal court." He admitted the test applied was a subjective one—there must be actual knowledge or belief and this instruction "permitted the jury to apply the objective standard of what the (defendants) ought to have known rather than the subjective standard of what they did know." See *United States* v. *Solow*, U.S. D.C., S.D. N.Y., 138 F. Supp. 812 (l.c. 816, footnote 14, discussing and quoting from the Solicitor General's memorandum in the Odom Certiorari matter in this Court).

Sheetz' name was not indorsed on the Omaha indictment. (Tr. Govt. Exh. No. 1, Tr. 19, 21) There is no evidence there was any publicity given the fact Sheetz was a witness before the grand jury in Omaha. Sheetz testified he did not discuss the Biase prosecution with anyone in Kansas City. (Tr. 107) Even had there been such publicity, there was no evidence appellants, residing in Kansas City, 219 miles from Omaha, saw or had any notice thereof. There is no evidence either appellant had ever been in Omaha, knew anyone in Omaha, or had any interest or connections with anyone in Omaha.

There is no evidence either appellant had ever even so much as heard of Biase. There is no evidence that either appellant had ever had any connection with or interest in the narcotics traffic. There is no evidence either appellant had any knowledge there was a prosecution pending against Biase in the Federal Court in Omaha or that Sheetz might be a witness in said proceedings. There was no evidence either appellant could have had any interest or motive in preventing Sheetz from testifying against Biase in Omaha.

The action of the Court of Appeals in reversing the case outright as to Biase for want of any evidence seems to us conclusive proof of the total lack of any community of interest or cooperation between appellants and Biase or anyone representing his interest.

Sheetz told Officer Sanders almost immediately after the shooting that he was assaulted by two colored men (a fact which Sanders concealed until after this trial. See point 5 following herein.) During the remainder of the day he refused to name his assailants, saying he was not ready to do so. (Tr. 139, 260, 261) It was not until the evening, following the shooting that morning, that Sheetz

named appellants as his assailants. (Tr. 139) At still a later time Sheetz first stated that the assailant holding the gun, as he fired the last shot, said "here's something from Tony". (Tr. 114, 113, 162) The man he identified as making such statement was appellant Anthony (Tony) Cardarella. (Tr. 113, 162) Sheetz admitted he knew three or four Tonys other than Cardarella and Biase. (Tr. 104) Sheetz claimed Tony Biase was the only Tony who had any reason to want to have him shot. (Tr. 104) and from that evidence alone the jury and courts below have based their verdicts and judgments.

Such findings are based on a pyramiding of speculative and unsupported inferences.

To reach such finding it must be inferred that appellants had heard of Biase (of which there was no evidence); that appellants had knowledge that Biase was being prosecuted in the Federal Court in Omaha (of which there was no evidence); that appellants had knowledge that Sheetz might be a witness in the case pending against Biase in Omaha (of which there was no evidence) and it must be further inferred that the assault on Sheetz was for the purpose of attempting to prevent him from testifying in the case in Omaha (of which there was no evidence). From the most favorable viewpoint, the evidence (if it can be so dignified) tending to connect appellants or either of them with the prosecution of Biase in Omaha is entirely and totally circumstantial and extremely tenuous as evidenced by the belabored and hypothetical and generalized treatment of that most material issue in the opinion (Opinion pp. 14-16, 18-19) theorizing on how it might be thought possible that appellants were so connected with such prosecution, but never mentioning the many more rational and reasonable explanations for the obvious lack of evidence connecting appellants with the Omaha prosecution. The

Court overlooked and failed to consider the more reasonable and probable explanation for Sheetz accusing Ferina and Cardarella, suggested by counsel for said appellants, to-wit: that Sheetz, a professional burglar, had been again dealing in narcotics while acting as stool pigeon for the Government and awaiting federal sentence on his plea of guilty on the narcotics charges; that he was shot by persons involved with him in narcotics traffic and he dared not let the Government find that out, so that after thinking it over during the day and into the evening after being shot he accused Ferina and Cardarella in the belief they could be made prime suspects as they were little and unimportant men of Italian ancestry who lived in the north end and so were vulnerable to suspicion and prejudice. If he could turn the suspicion of the Government against them and away from the real criminals he hoped to avoid exposure of his own nefarious activities while posing as a stool pigeon for the Government.

We submit further it is more reasonable that a "Tony" worked up to a state of mind that he was trying to kill Sheetz would have reference to himself in saying, "here's something from Tony" rather than having reference to a Tony he had never heard of.

2. There Was No Evidence of a Conspiracy to Obstruct Justice by Assaulting Sheetz or That Appellants, or Either of Them Were Members of Any Such Conspiracy.

We first direct attention to the fact that the Court of Appeals held there was no evidence Anthony Biase of Omaha, the party claimed to be the intended beneficiary of the assault on Sheetz, had any connection with the alleged conspiracy, and his conviction was reversed outright.

The Court overlooked the fact the discharge of Biase, the central figure in the alleged crimes, removes the hub and spokes of the alleged wheel (which never had a shadow of a rim) of conspiracy without which there is no evidence to sustain the conspiracy charge under Count IV and leaves the verdict on that count resting only on a pyramiding of inferences; to show and reach such findings it must be inferred that appellants had heard of Biase; it must be further inferred that they knew Biase was being prosecuted in the Federal Court in Omaha; it must be further inferred that they knew Sheetz might be a witness in that case and it must be further inferred that for some unknown reason appellants were interested in preventing Sheetz testifying against Bias in that case.

In affirming such judgment based on evidence exposing such an obvious hiatus which this court attempts to overcome by the pyramiding of inferences, this opinion is brought into direct conflict with the following decisions: *Kotteakos* v. *United States*, 328 U.S. 750, 755, 66 S. Ct. 1239, 1243; *Canella* v. *United States*, 9 Cir., 157 F.2d 470, 478 (8); *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711, 63 S. Ct. 1265, 1269.

The Government attempted to prove a connection between Omaha and Kansas City through defendant, Carlton A. Young, but the evidence was insufficient and the Court entered a judgment of acquittal in favor of Mr. Young (Tr. 304, 463) and struck out all the testimony theretofore admitted purporting to show some connection or communication between Omaha and Kansas City in relation to the Biase prosecution in Omaha. (Tr. 303, 304, 463, 464, 465) That left a complete hiatus between Omaha and Kansas City as to any connection between them in relation to the Biase prosecution in Omaha. But even the

evidence stricken had no tendency to link Ferina and Cardarella in any way with Young or anyone in Omaha as they were in no way involved therein.

We next call attention to the fact that the Conspiracy Count of the Indictment (Count IV) charged appellants with Biase and others with conspiring to obstruct justice by assaulting Sheetz for the purpose of preventing him from testifying against Biase in the criminal action pending against Biase in the Federal Court in Omaha. (See Indictment, Appendix pp. A3-A6.)

It was therefore an essential element of the conspiracy charge that the Government prove that appellants had knowledge that Biase was being prosecuted in the Federal Court in Omaha; that appellants knew Sheetz might be a witness for the Government in that case, and that the purpose of the conspiracy was to prevent Sheetz from testifying for the Government in the case in Omaha. *Pettibone* v. *United States*, 148 U.S. 197, 13 S. Ct. 542, 37 L. Ed. 419.

In the case of *Ingram* v. *United States*, 360 U.S. 672, 79 S. Ct. 1314, in reversing convictions against two alleged conspirators the Court said (l.c. 1319):

> "[2, 3] It is fundamental that a conviction for conspiracy under 18 U.S.C., § 371, 18 U.S.C.A., § 371, cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States'. *Pereira* v. *United States*, 347 U.S. 1, 12, 74 S. Ct. 358, 364, 98 L. Ed. 435. There need not, of course, be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operation. 'Without the knowledge, the intent cannot exist.'

Direct Sales Co. v. United States, 319 U.S. 703, 711, 63 S. Ct. 1265, 1269, 87 L. Ed. 1674.

"[4, 5] '[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.' The substantive offense which Smith and Law were accused of conspiring to commit was the wilful evaluation of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge of wilfulness. Spies v. United States, supra, Cf. United States v. Falcone, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128.

"[6-14] Indulging, as of course we must, in that view of the evidence most favorable to the Government, we simply cannot discern adequate foundation in the present record for a finding that Smith and Law had such knowledge of Ingram's and Jenkins' wagering tax liability. The record is completely barren of any direct evidence of such knowledge. It was not shown, for example, that any reference had ever been made by any of the petitioners to possible tax liability, or that they had filed a return or paid a tax in previous years. The Government relied instead upon evidence which, it asserts, circumstantially proved the requisite knowledge on the part of Smith and Law."

The *Ingram* case, *supra*, at l.c. 1320 held:

"What was said in Direct Sales Co. v. United States on behalf of a unanimous Court is of particular relevance here:

'Without the knowledge, the intent cannot exist. * * * Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. * * * This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes.' 319 U.S. at page 711, 63 S. Ct. at page 1269."

In *United States* v. *Bufalino*, 2 Cir., 285 F.2d 408, the Court, in ordering dismissal of the conspiracy count, stated the law as follows (l.c. 416):

> "Evidence of the same intent or knowledge would be required to convict conspirators as to convict those charged with the substantive offense, Ingram v. United States, 1959, 360 U.S. 672, 677-678, 79 S. Ct. 1314, 3 L. Ed. 2d 1503; United States v. Ausmeier, 2 Cir., 1945, 152 F.2d 349."

There is no evidence in this case, either direct or circumstantial, that appellants, or either of them, ever had any connection with the narcotics traffic. There is no evidence in this case, either direct or circumstantial, that appellants ever met or even heard of defendant Biase before the indictment in this case. There is no evidence, either direct or circumstantial, that appellants had any information, notice or knowledge that defendant Biase was being prosecuted for sales of narcotics in the United States Court at Omaha, Nebraska.

There was no evidence that appellants had ever been in Omaha, Nebraska, were acquainted with anyone there or ever had any connections or communication with anyone in Omaha, Nebraska.

There was no evidence that the newspapers and other publications circulated in the Kansas City area ever carried any account of the indictment or prosecution of appellant Biase in Omaha prior to the assault of Sheetz. Furthermore, it is unlikely that if there had been any such publication it would have mentioned the name of Sheetz as his name was not on the indictment in the Biase case. (Tr. 20, Govt. Exh. No. 1)

Furthermore, even appellant Biase would have little motive for wanting to prevent Sheetz from testifying

against him in Omaha. The real witness in the case and the one who testified against Biase at the trial in Omaha was Federal Narcotics Agent Bernard A. Theisen, Jr. (Tr. 3, 28) Sheetz did not testify in the Biase trial in Omaha. (Tr. 19)

There was no evidence that Biase and appellants had any mutual friends or acquaintances or that they ever communicated with each other, either directly or indirectly.

There was no evidence that during the proceedings against Biase in Omaha these appellants ever were together or communicated with each other, either directly or indirectly. (Tr. 164)

There is in this record no evidence that there was a conspiracy to prevent Sheetz testifying against Biase in Omaha or that appellants were parties to any such conspiracy.

In the case of *Parr* v. *United States*, 363 U.S. 370, 393, 80 S. Ct. 1171, the Court said (l.c. 1184):

> "[16] Inasmuch as the twentieth count charged petitioners with conspiring to commit the offense complained of in Count 1, and inasmuch as, on the facts of this record, that count cannot be sustained, it follows that petitioners' convictions upon the twentieth count cannot stand."

We are confident we have demonstrated that the Government failed to make a submissible case under the substantive counts of the indictment so the alleged conspiracy to commit such substantive offenses must also fail on that account as well as on account of the total lack of any evidence of conspiracy.

3. The Conviction of Appellants Without Evidence of the Essential Elements of the Offense Charged Denies Them Due Process of Law As Guaranteed under the Fifth Amendment to the Constitution of the United States.

We have pointed out under Point 1 above that essential elements of the crime charged are:

(1) that appellants had knowledge that Biase was being prosecuted in the Federal Court at Omaha;

(2) that appellants had knowledge that Sheetz might be a witness in that case; and

(3) that it was because Sheetz might be a witness in that case that the assault was made on him.

We have further pointed out under Point 1 above that there was no evidence of any of said essential elements.

Under such circumstances the convictions herein deprive appellants of due process of law in violation of their Constitutional rights under the Fifth Amendment to the Constitution of the United States.

Furthermore, there was no evidence of conspiracy under Count IV.

In the case of *Thompson* v. *City of Louisville*, 362 U.S. 199, 206, 80 S. Ct. 624, the Court said (l.c. 629):

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."

In the case of *Garner* v. *State of Louisiana*, 82 S. Ct. 248, the Court said (l.c. 251):

"* * * we hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment. As in Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654, our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace. In addition, we cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction."

While the above decisions are based on the Due Process Clause of the Fourteenth Amendment we submit that is immaterial since the Due Process Clause of the Fifth Amendment is generally construed to impose the same restraints on the Federal Government as the Fourteenth imposes on the States.

In the case of *Heiner* v. *Donnan*, 285 U.S. 312, 326, 52 S. Ct. 358, in an estate tax case the Court said (l.c. 361):

"[4] Nor is it material that the Fourteenth Amendment was involved in the Schlesinger Case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Coolidge v. Long, 282 U.S. 582, 596, 51 S. Ct. 306, 75 L. Ed. 562."

In the case of *Bowles* v. *Willingham*, 321 U.S. 503, 518, 64 S. Ct. 641, in an injunction proceeding under the Emergency Price Control Act, the Court said (l.c. 649):

"And the restraints imposed on the national government in this regard by the Fifth Amendment are no

greater than those imposed on the States by the Fourteenth. Hamilton v. Kentucky Distilleries Co., supra; United States v. Darby, 312 U.S. 100, 657, 61 S. Ct. 451, 85 L. Ed. 609, 132 A.L.R. 1430."

In the case of *Curry* v. *McCanless*, 307 U.S. 357, 369-370, 59 S. Ct. 900, in an estate tax case, the Court said (l.c. 907):

"If the 'due process' of the Fifth Amendment, U.S.C.A. Const., does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner, who is entitled to its protection, Burnet v. Brooks, 288 U.S. 378, 53 S. Ct. 457, 77 L. Ed. 844, 86 A.L.R. 747; cf. Russian Volunteer Fleet v. United States, 282 U.S. 481, 489, 51 S. Ct. 229, 231, 75 L. Ed. 473, the Fourteenth can hardly be thought to make us do so here, for the due process clause of each amendment is directed at the protection of the individual and he is entitled to its immunity as much against the state as against the national government."

4. The Trial Court Committed Prejudicial and Reversible Error in Overruling Objections of Appellants' Counsel to the Final Argument of the Special Assistant to the Attorney General of the United States in Charge of the Prosecution That He Believed Government Witness Sheetz and Vouched for Him.

Government counsel in his closing argument made the following unlawful, unprovoked and prejudicial argument (Tr. 370-372):

"The mere fact that a man, a witness, has a past criminal record doesn't mean that you must disbelieve him. That only goes to his credibility in case you want to disbelieve him. You didn't have to disbelieve him. I don't disbelieve him.

"Mr. Waters: Just a moment, please. We except to that, if the Court please, and ask that it be

stricken. The Court will instruct the jury as to the credibility of the witness.

"Mr. West: We object to the testimony of this man.

"The Court: There has been a lot of speculating from the defendants in this case. I don't know why it should be stopped now. He has a right to say what he pleases. What is your objection? The Court follows you and knows what is going on, and knows what you mean. What is your objection, Mr. Waters?

"Mr. Waters: The objection is that Mr. Krouse stated to the jury the law on the credibility of witnesses, and has furthermore made the positive statement of his personal opinion as to his belief in the witness, which is completely the function of the Court and jury.

"The Court: He is drawing his own inferences. Gentlemen, if you are going to get into that, I think you members of the Bar know that the lawyers should never express what they believe. They say what they believe the evidence shows, but what they believe doesn't mean anything. All of you have found out what it means. You don't express what you believe. What you think the evidence shows, that is your function for all of it. We apply it almost every day in the court room. Go ahead.

"Mr. Krouse: I put Sheetz on the stand and I vouch for him.

"Mr. West: If the Court please, I object to this testimony. I would like to make a record.

"The Court: All right.

"Mr. West: This man represents the United States Government. His information along that line might conceivably differ from the information that he has, information not before this jury, and we object to that as highly prejudicial and request an instruction to the jury—

"Mr. Waters: We object—

"Mr. Silverforb: We object—

"The Court: All three defendants join in it and it is overruled as to all three defendants.

"Mr. Krouse: The defense have already argued a statement that I have vouched for Sheetz as a witness and I do. There was never a witness who ever took a witness stand who was more impressive, who was more self-contained. Never did he ever give a single bit of back-talk. He told his story as he knew it. * * *"

None of the attorneys for the defense at any time argued whether Mr. Krouse vouched for or did not vouch for Sheetz as a witness, as he erroneously stated during the argument, and the Government has been invited to point out in the record where such a thing occurred but to date has been unable to do so.

In the case of *Berger* v. *United States*, 295 U.S. 78, 88-89, 55 S. Ct. 629, the Court stated the law as follows (l.c. 633):

"[8] The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may proscute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney,

will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak —depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

"In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached. Compare Fitter v. United States, (C.C.A.) 258 Fed. 567, 573; Johnson v. United States, (C.C.A.) 215 Fed. 679, 685, L.R.A. 1915A, 862; People v. Malkin, 250 N.Y. 185, 201, 202, 164 N.E. 900; State of Iowa v. Roscum, 119 Iowa, 330, 333, 93 N.W. 295."

In the case of *Greenberg* v. *United States*, 1 Cir., 280 F.2d 472, the defendant was found guilty of filing a false and fraudulent income tax return. In condemning the argument of the United States Attorney the Court there said (l.c. 474):

"In vigorous language he expressed his personal opinion of the trustworthiness of the government's evidence and the consequent guilt of the accused. Upon objection interposed, the court ruled in the presence of the jury that the prosecutor had a right to argue 'his belief in the evidence.' Counsel continued, and the court overruled a second objection, but expressed a caution. The argument was then repeated.

"Rule 15 of the Canons of Professional Ethics of the American Bar Association reads,

'It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.'

"Government counsel stated in oral argument before us that this was 'inapposite' because he is an 'advocate.' We are not clear whether he disapproves of the principle, or whether he considers himself outside of it. In either event we disagree. To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon to be elemental and fundamental. See also 1 Bishop, New Criminal Procedure § 993 (2d Ed. 1913); 6 Wigmore, Evidence, § 1806 (3d Ed. 1940).

"It is true that special circumstances, such as a personal attack upon counsel, may occasionally justify a reply. See, e. g., United States v. Socony-Vacuum Oil Co., Inc., 1940, 310 U.S. 150, 240-242, 60 S. Ct. 811, 84 L. Ed. 1129; Gridley v. United States, 6 Cir., 1930, 44 F.2d 716, 739; United States v. Battiato, 7 Cir., 1953, 204 F.2d 717, 719. Too much has sometimes been read into these cases due in part, perhaps, to language in some of the opinions.' To the extent that cases may be found that permit counsel to state their personal belief as a matter of course, we do not follow them. We agree with the statement that 'No one who is at all conversant with jury trials can fail to see the possible prejudice * * *'." State v. Gunderson, 1913, 26 N.D. 294, 297, 144 N.W. 659, 660.

In the present case there was no personal attack upon the United States Attorney and there was no justification for his stating he vouched for Sheetz thereby throwing the full weight of his position and prestige as the representative of the United States sent directly from Washington behind the credibility of Sheetz.

We submit the opinion of the Court of Appeals herein approving the argument of the Special United States Attorney is not only in direct conflict with the *Berger* and *Greenberg* cases, *supra*, but is also and for like reason in conflict with the opinions of other United States Courts of Appeals in the following cases: *Wallace* v. *United States*, 4 Cir., 281 F.2d 656, 657; *Steele* v. *United States*, 5 Cir., 222 F.2d 628, 631; *Ginsberg* v. *United States*, 5 Cir., 257 F.2d 950, 954; *United States* v. *Spangelet*, 2 Cir., 258 F.2d 338, 342, and *Snipes* v. *United States*, 6 Cir., 230 F.2d 165, 167.

If ever a witness needed help from the prosecuting attorney, Sheetz did. He was the only witness identifying or in any way connecting appellants with this crime. All the other witnesses refused to identify appellants (Tr. 202, 221, 194) and all described the men they saw in such ways as to positively disprove these appellants could have been the assailants. (Tr. 194, 202, 198, 217) His identification was based on two fleeting glimpses under the most adverse conditions.

For approximately seven hours, from around ten o'clock in the morning until about 5:30 o'clock that evening, Sheetz refused to identify his assailants and then finally named appellants. (Tr. 183, 184, 186, 116, 210)

The record reflects that in 1939 Sheetz was convicted of four burglaries in Virginia and sentenced to 20 years. (Tr. 150, 151) He was later again convicted of burglary at Newport News, Virginia, and sentenced to five years and

was finally released in 1956. (Tr. 151) Sheetz admitted he has punched safes. (Tr. 159) Sheetz admitted he made three sales of narcotics to a young blond haired lady in Kansas City (Tr. 156, 157) and has pled guilty to purchase of narcotics in the Western District of Missouri. (Tr. 160) Although Sheetz was arrested during September, 1959, for said purchase, he has not yet been sentenced. (Tr. 105) Sheetz further made three or four purchases of narcotics in Omaha, Nebraska, during 1959. (Tr. 101) Immediately before the shooting, Sheetz drove up to his house in an air-conditioned Cadillac (Tr. 159) which had a loaded automatic pistol underneath a newspaper on the front seat (Tr. 263) and three boxes of tools including punches and a sledge hammer in the back (Tr. 264). Sheetz testified he had punched safes. (Tr. 159) It is submitted the above evidence showed Sheetz is an habitual criminal and burglar and that without help from the United States Attorney his testimony must have been most unconvincing. We can conceive of nothing which could have been more prejudicial to appellants. This decision, if permitted to stand, will lead prosecutors to vouch for the credibility of their witnesses as a regular routine to the subversion of justice in jury trials, the fairness of which is guaranteed by the Constitution.

5. The Trial Court Abused Its Discretion in Overruling Appellants' Motions for New Trial Because of Newly Discovered Evidence (Cases Numbered 16909 and 16911 in the Court of Appeals).

(Appellants' motions in these cases were dismissed summarily and the record consists of the motion in Case No. 16909 and memorandum briefs of the parties. "Motion" herein refers to the motion in Cases Nos. 16909 and 16911. (Appendix pp. A11-A37.) "Tr." refers to the transcript in Case No. 16783, the main case.)

It is undisputed that the first law enforcement officer to reach Sheetz after he was shot was Officer Robert W. Sanders of the Kansas City, Missouri, Police Deportment. (Tr. 209)

In his deposition previous to trial (Motion 6, 3) and at the two State Court trials of Ferina (Motion 9, 8), and in this trial (Motion 7, 3) Officer Sanders testified consistently that at the scene of the shooting Sheetz refused to give description of the individuals or tell who assaulted him. In a deposition subsequent to the three trials, while appeal herein was pending, Officer Sanders admitted that in none of the three trials did he reveal the fact that Sheetz told him at the scene that two colored men with white handkerchiefs on their faces had shot him (Motion 3).

At the trial of this case Officer Sanders testified that Sheetz while at the scene wouldn't tell who shot him. (Tr. 209, 210)

At the trial of this case Sheetz testified that he didn't think he gave anybody a description of anybody who shot him until after his wife came to the hospital that night. (Tr. 138, 139, Motion 12)

In the first State trial Sheetz testified he didn't think he told Officer Sanders anything about the people who shot him (Motion 11).

After the three trials, when the rumor got around that Officer Sanders had made a police report which was inconsistent with his testimony in the trials in the three cases, a Court order was required to force the State to make the Sanders' report available to a defendant in a related case (Motion 12). This report further revealed a white handkerchief was found in Sheetz' hand when Officer Sanders arrived at the scene.

To appreciate the vital importance of this newly discovered testimony, it must be remembered that Mrs. Anna Mae DeWitt, a witness in all of the cases (put on by the defense in the State Court cases and put on by the Government in the Federal Court case) was at the scene and was the first one to see the two men as they ran from Sheetz' home, called the police to the scene and had the best and longest view of the men of any witness. (Tr. 197-200) She reported to the police immediately that the men were colored and testified in all three trials that the men who assaulted Sheetz were colored men. (Tr. 199, 200) The appellants, whom Sheetz finally named as his assailants on the evening of the day he was shot in the morning, were caucasians of Italian ancestry. (Tr. 139)

It was then developed for the first time, following trial of this case, that Sheetz told Officer Sanders at the scene of the shooting and within a few minutes thereafter, while he was writhing on the porch waiting for the ambulance, that "two colored males with white handkerchiefs over their faces shot him." (Motion 2, 3, 4) The exact quotation from Officer Sanders' report is: "He first stated it was two white men and then said it was 2 colored males with white handkerchiefs over their faces." (Motion, Exhibit No. 2)

The testimony of Officer Sanders pointed out above and the testimony of Sheetz referred to, we submit, reveal a pattern intended to conceal from appellants and their counsel the vital fact that Sheetz had a white handkerchief in his hand, within a few minutes after being shot, at the scene of the shooting and while he was writhing in pain waiting for the ambulance told Officer Sanders he was shot by "2 colored males with white handkerchiefs over their faces," which corroborated Mrs. DeWitt in her identification of two colored men, one with a white handkerchief which he removed from his face, and was directly con-

tradictory of his later identification of appellants, who are caucasians.

Government counsel did not deny the verity of the testimony and factual statements in appellants' motion for new trial for newly discovered evidence in their opposing suggestions in the trial court and in their brief in the Court of Appeals and did not deny their knowledge of the contents of the report of Officer Sanders but did deny the testimony of Officer Sanders was inconsistent with his report and did deny Government counsel owed any duty to reveal the contents of Officer Sanders' report. The Court of Appeals refused to grant a new trial on this ground, holding there was a lack of diligence on the part of defense counsel and no duty on the United States Attorneys. Appendix pp. A71-A74.

We submit that on its face the testimony of Officer Sanders was not the open, frank, full disclosure to be expected from a public police officer interested only in seeing that justice is done. His answers were obviously studiously designed to conceal the fact Sheetz told him he was shot by two colored men rather than two white men as he later claimed, and made to dovetail in with Sheetz' testimony to mislead appellants and their counsel. It was obvious to counsel for the State in the State Court trials and for Government counsel in this trial that appellants and their counsel were unaware of the existence of such evidence but no effort was made by the prosecution to bring out such evidence or to call this information to appellants or their counsel.

In the case of *Griffin* v. *United States*, 336 U.S. 704, 69 S. Ct. 814, the facts were: Petitioner was convicted of murder in the first degree and sentenced to death. At the trial Petitioner testified the killing was the outcome

of a quarrel in a card game when the deceased advanced with his hand in his pocket and told Petitioner he would kick Petitioner's teeth out and that Petitioner shot deceased in self defense. Petitioner's version of the occurrence was contradicted by five government witnesses who testified the argument had nothing to do with the card game but that an argument occurred over another matter, that Petitioner left and returned within ten minutes and immediately shot deceased who made no move. About a month before the date set for execution Petitioner filed a motion for new trial because of newly discovered evidence, it being that the attendant at the morgue had found an opened pen knife in the trousers pocket of the deceased and that the prosecutor knew of this at the time of trial but failed to introduce this circumstance or make it available to the defense.

The motion also alleged there was evidence that playing cards were on the floor immediately after the shooting which would tend to corroborate Petitioner's testimony that the card game was in progress at the time of shooting.

The Court there said (69 S. Ct. l.c. 815):

> "As to Griffin's discovery, after his conviction was affirmed, of the undisclosed knife in the pocket of the deceased, the Government conceded that it knew of this circumstance at the time of the trial and despite that knowledge neither introduced the fact in evidence nor felt any duty to make it known to the defense. The Government justified this on the ground that in its view the circumstance of the knife was inadmissible, since knowledge of its presence in the pocket of the deceased had not been communicated to Griffin either by sight or otherwise. This District Judge took this view of the law and denied the motion for a new trial.

• • •

"An appeal having been taken, the Government moved to dismiss the appeal on the ground that 'the issues raised by appellant's motion for a new trial were fully explored in the court below and that the disposition made of them by the trial court was manifestly correct.' The appeal was dismissed by a unanimous Court of Appeals, presided over by a judge than whom no one is more alert in protecting the rights of the accused.

"Unfortunately, the Court of Appeals evidently thought that the ground for dismissing the appeal was too clear to require explication. It dismissed the appeal without an expression of views regarding the admissibility of the evidence on which the claim for a new trial rests. It may well have done so on the ground that in the District evidence of this nature is inadmissible."

In reversing and remanding the *Griffin* case, *supra*, with directions to the Court of Appeals to decide the rule prevailing in the District of Columbia as to admissibility of uncommunicated threats, the Court said (l.c. 816):

"It seems to us more appropriate for the Court of Appeals to address itself directly to the issue of admissibility. This is so in order to rule out the inference that the Court of Appeals may, in applying United States v. Johnson, 327 U.S. 106, 66 S. Ct. 464, 90 L. Ed. 562, have deemed the denial of a motion for a new trial on the basis of newly discovered evidence solely a matter for the trial court's discretion.

"Were the Court of Appeals to declare that the controverted evidence was admissible according to the law prevailing in the District, it would have to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it. If the Court of Appeals had decided that the disputed evidence was not

admissible in the District of Columbia on a claim of self-defense and on that ground had sustained the denial of the motion for a new trial, there would have been an end of the matter. It is not to be assumed that this Court would have granted a petition for certiorari to review the ruling since the determination would have been a matter of local law as are the rules of evidence prevailing in the State Courts."

In the case of *Griffin* v. *United States*, 183 F.2d 990, upon remand of the above case by the Supreme Court of the United States, the Court of Appeals for the District of Columbia said (l.c. 991):

"The ultimate question is whether the District Court erred in refusing to grant a new trial when it appeared that after the homicide an open penknife was found in the same trousers pocket of the deceased in which his hand was, and that the prosecution knew at the time of the trial that such testimony was available but neither produced it in court nor disclosed it to the defense."

In reversing and remanding the case with instructions to the District Court to grant a new trial the Court of Appeals said (l.c. 992):

"We therefore adopt the following rule as the one we think should prevail in the District of Columbia. When a defendant claims self-defense and there is substantial evidence, though it be only his own testimony, that the deceased attacked him, evidence of uncommunicated threats of the deceased against the defendant is admissible. We agree with cases in which uncommunicated threats have been admitted although there were eye-witnesses.

"[3] The question remains whether a new trial should be granted. In remanding the case the Supreme Court said: 'Were the Court of Appeals to declare that the controverted evidence was admissible according to the law prevailing in the District, it would have

to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.' 336 U.S. at pages 708-709, 69 S. Ct. at page 816. We think it would be too dogmatic. The appellant is therefore entitled to a new trial."

See to like effect: *Mejia* v. *United States*, 9 Cir., 291 F.2d 199 (3), following the Griffin case and reversing and remanding the case with directions to the trial court to grant a new trial because of newly discovered evidence.

See to similar effect: *Delbridge* v. *United States*, U.S. Ct. App., Dist. of Col., 262 F.2d 710, 712.

We submit that in here denying appellants a new trial because of the newly discovered evidence, the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court and in conflict with the decisions of the Ninth Circuit and the Court of Appeals of the District of Columbia.

In this close case, with Sheetz as the only identifying witness, we submit that as held by this court in *Griffin* v. *United States, supra*, it would "be too dogmatic, on the basis of pure speculation, to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

The newly discovered evidence here is not merely cumulative or impeaching.

The statement of Sheetz was made within a few minutes of the time he was shot, right at the scene while he was lying on the porch, in great pain and thrashing about (Opinion Court of Appeals, pp. 29, 30).

Such evidence was admissible as a spontaneous declaration or *res gestae*. *Lampe* v. *United States*, U.S. Ct. App.,

D.C., 229 F.2d 43, 45; *McQueen* v. *United States*, U.S. Ct. App., D.C., 262 F.2d 455; *Guthrie* v. *United States*, U.S. Ct. App., D.C., 207 F.2d 19, 22-23; *Bailey* v. *Branin*, 3 Cir., 279 F.2d 344, 346 (1).

This evidence was substantive evidence tending to prove Sheetz' assailants were two colored men and not these white appellants. *Travelers Ins. Co.* v. *Mosley*, 8 Wall. 397, 407, 19 L. Ed. 437, *et seq.*; *Southern Extract Co.* v. *Green*, 6 Cir., 103 F.2d 232, 233 (2); *Fort Street Union Depot Co.* v. *Hillen*, 6 Cir., 119 F.2d 307, 311; *Gaynor* v. *Atlantic Greyhound Corporation*, 3 Cir., 183 F.2d 482, 485.

While it is not in all cases an absolute bar to a new trial on the ground of newly discovered evidence, we submit the evidence here is more than merely cumulative. The newly discovered evidence in this case is different in kind; it is new evidence of a higher type or character. 66 C.J.S. 322, New Trial, Sec. 113, b.; 39 Am. Jur. 178, New Trial, Sec. 173.

CONCLUSION.

Wherefore, Petitioners pray that a Writ of Certiorari issue under the seal of this Court to the United States Court of Appeals for the Eighth Circuit to the end that this cause may be reversed outright, or that it be reversed and remanded for a new trial because of the prejudicial argument of the Special United States Attorney and the newly discovered evidence.

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